1979

Charles Kinne v. Industrial Commission of Utah : Brief of Plaintiff

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

CHARLES KINNE,)

Plaintiff,)

vs.)

INDUSTRIAL COMMISSION OF UTAH,)

Defendant.)

BRIEF OF PL

REVIEW FROM THE FINDINGS AND [illegible] COMMISSION OF UTAH.

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IN THE SUPREME COURT OF THE

STATE OF UTAH

CHARLES KINNE,	)	
Plaintiff,	)	
vs.	)	
INDUSTRIAL COMMISSION OF UTAH,	)	Case No. 16447
Defendant.	)	

BRIEF OF PLAINTIFF

REVIEW FROM THE FINDINGS AND ORDER OF THE INDUSTRIAL COMMISSION OF UTAH.

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BRIEF OF PLAINTIFF

STATEMENT OF THE KIND OF CASE

This is a review of the Findings and Order entered by the Industrial Commission of Utah on February 23, 1979 and Supplemental Order dated March 27, 1979 in the matter of Susan Wynn, Widow of Max L. Wynn, deceased, vs. Freeport Transport, Inc., State Insurance Fund and Charles Kinne.

DISPOSITION OF INDUSTRIAL COMMISSION

The Industrial Commission entered a finding that the decedent, May L. Wynn, was in the course of his employment at the time of his death and by Supplemental Order held that the decedent was an employee of the plaintiff.

RELIEF SOUGHT ON REVIEW

The plaintiff requests this Court to set aside the finding of the Industrial Commission and the award made on the grounds that the facts do not support the award.

STATEMENT OF FACTS

On or about May 12, 1976, Charles W. Kinne entered into an Agreement with Freeport Transport, Inc. whereby Kinne would lease his tractor to Freeport for their use and benefit. (R321-328) The Agreement defined Freeport as Carrier and Kinne as Contractor. The pertinent parts of the Agreement provide:

> "During the entire term hereof, the sole possession, responsibility for and control and direction of the vehicular equipment described above and the drivers thereof, whether employees of Contractor or Carrier, shall reside in Carrier." (R322)
>
> "Contractor shall be solely responsible for the direction and control of employees, agents and servants of Contractor, including selecting, hiring, supervising, directing, setting wages, hours and working conditions, and paying and adjusting grievances of the employees." (R323)
>
> "No other provisions of this Agreement shall be interpreted or construed as creating or establishing the relationship of employer and employee between Carrier and Contractor or any driver, agent, servant, or any other employee of Contractor." (R324)

"Contractor shall maintain workmans compensation coverage for all employees, agents or servants employed by the Contractor in the performance of this contract." (R326)

"Proof of such coverage (workmans compensation) as is required by this paragraph and notice to Carrier of cancellations thereof shall be submitted to Contractor by Carrier." (R326)

"Carrier assumes liability for bodily injuries to or the death of any person other than Contractor, the employees, agents or servants of Contractor resulting from the negligent operation, maintenance or use of the vehicle described herein." (R325)

"Carrier shall maintain insurance for the aforesaid liabilities, injuries, losses or damages as required by the Interstate Commerce Commission and the State and other governmental authorities." (R326)

Kinne failed to get workmans compensation coverage and Freeport Transport, Inc. failed to require proof of the workmans compensation coverage as required by the Lease Agreement. (R232)

Approximately the last part of October, Max L. Wynn, a theretofore unemployed truck driver, found a job answering an advertisement for A & K Railroad Materials who referred him to Mr. Kinne. (R52)

The application of employment came from A & K Railroad Materials. (R54) A & K Railroad Materials and Freeport Transport, Inc. have common stockholders and

share space in the same building at Freeport Center. (R80) Mr. Wynn had to pass a road test and written test administered by Freeport Transport, Inc. in order to become employed. (R56-58) Freeport Transport, Inc. made sure all drivers took the physical required by the Department of Transporation. Freeport Transport, Inc. required the drivers to call each day so they could schedule their freight. (R60) Freeport Transport, Inc. administered all the record keeping required by the Department of Transportation as it referred to the records kept by the drivers. (R78) All trip envelopes and supplies were furnished by Freeport Transport, Inc. to the drivers. (R101) Signs were placed on the sides of the tractor indicating it was engaged in the business of Freeport Transport, Inc. (R258) All safety standards for drivers and equipment were administered and controlled by Freeport Transport, Inc. (R87) If problems arose with the driver refusing to take loads or failing to perform in a manner satisfactory to Freeport Transport, Inc., they would request disciplinary action by Mr. Kinne and on at least one occasion at the request of Freeport, Mr. Kinne discharged one of his drivers for failing to perform in a satisfactory manner. (R89, 90, 143, 221) Freeport Transport, Inc. was the ICC carrier and ultimately responsible to the ICC for their drivers. (R81)

On November 9, 1976, Max L. Wynn picked up his load at Paonia, Colorado and arrived in Price, Utah at 1:00 p.m. This was a Tuesday. On November 10, 1976, he drove from Price and arrived at Clearfield approximately 10:00 a.m. (R91-93) The nature of Mr. Wynn's load prevented him from driving at night or on weekends or holidays and there was some indication that there may have been a holiday coming up in Nevada on the following Thursday or Friday. It took Mr. Wynn eight hours of driving to get from Paonia, Colorado to Clearfield, Utah which computed out to an average fifty miles per hour rate of travel. His ultimate destination was Milpitas, California which could have been driven in an additional sixteen hours traveling at fifty miles per hour. (R91-96) Mr. Wynn decided to return to Clearfield rather than proceed directly to California. During the next couple of days he ran shag loads for Freeport Transport, Inc. and was then instructed to proceed to California the next Monday, November 15, 1976. (R295-298)

There was no requirement, either by Charles Kinne or Freeport Transport, Inc., that Mr. Wynn take his tractor home. (R37, 134, 187, 217) On at least one occasion, his wife had taken him to Freeport Transport, Inc. to start a trip. (R37) On this particular occasion,

he took the tractor home and on November 15, 1976, while proceeding towards Freeport Transport, Inc. to start the completion of his trip to California, he drove around a crossing guard at a railroad track and was struck by a train and killed. (R201-202)

The widow of Max L. Wynn, Susan Wynn, filed her claim for workmans compensation benefits naming Freeport Transport, Inc., Charles Kinne and the State Insurance Fund as defendants. The State Insurance Fund was the insurer of Freeport Transport, Inc. Charles Kinne had no workmans compensation insurance. The matter was heard on October 5, 1977 before the Honorable Joseph C. Foley.

On July 25, 1978, Joseph C. Foley, the Administrative Law Judge, entered his Findings and Conclusions. In the Findings Joseph Foley stated: "Max L. Wynn was a statutory employee of Freeport Transport, Inc. and not of Charles Kinne by virtue of the amount of control and direction provided to Freeport Transport, Inc. in the Lease Agreement entered into by Charles Kinne and Freeport Transport, Inc." (R404) As a conclusion of law, Judge Foley held that Max L. Wynn was not in the scope and course of his employment at the time of his fatal accident and compensation benefits were therefore denied. (R404)

Thereafter, the widow filed a Motion for Review and on February 23, 1979 the Industrial Commission granted the Motion. (R438) The Commission, although not specifically deciding that Max L. Wynn was not the employee of Charles Kinne, implied that they were concurring in the Administrative Law Judge's decision that he was only the employee of Freeport Transport, Inc. The Commission further held that Mr. Wynn was in the course of his employment at the time of his fatal accident and the widow was therefore entitled to benefits. By letter dated March 19, 1979, the lawyer representing the State Insurance Fund requested the Commission to clarify its Order as to whether or not there was any joint liability of Charles Kinne with the statutory employer, State Insurance Fund, for the payment of benefits. (R448)

By Supplemental Order dated March 27, 1979, the Commission held that Max L. Wynn was the employee of Charles Kinne pursuant to the Lease Agreement and, therefore, Charles Kinne was jointly and severally liable for the compensation award to the widow. (R450)

On April 6, 1979 Charles Kinne objected to the Supplemental Order and requested further review which was denied on April 18, 1979. (R453-456)

ARGUMENT

POINT I

MAX L. WYNN WAS OUTSIDE THE COURSE OF HIS EMPLOYMENT AT THE TIME OF THE ACCIDENT CAUSING HIS DEATH.

The evidence at the hearing established that there was no requirement for Mr. Wynn to use the tractor to go to and from work. He would occasionally take it home for the purpose of servicing the tractor, but there was no requirement, either from Freeport Transport, Inc. or Charles Kinne, that he keep the truck at his home. There was adequate space at Freeport Transport Inc. to park the truck and keep it when it was not in use. It is clear that Mr. Wynn's election to go to Clearfield rather than to drive on to California which was his ultimate destination was his own choice and not at the direction of or for the benefit of his employer. It was well established that Mr. Wynn had sufficient time, even assuming there may have been a holiday in Nevada, to deliver his load to Milpitas, California by Friday evening.

In Barney v. Industrial Commission, 550 P. 2d 1271 (1973), the deceased was a bricklayer who was killed in an automobile accident while returning home from work. He lived more than sixty miles from the job site and pursuant to the agreement with his employer, was paid

an additional $1.75 per hour for traveling time when his job was more than sixty miles from his labor union temple.

The Court held that since the employer had no control over where the deceased lived or how he got to work, he was deemed not to be in the course of his employment while going to and from the premises where he was employed. Barney can only be distinguished from the present case by the fact that the decedent, Max L. Wynn, was driving Charles Kinne's tractor at the time of his death. The election to drive the tractor by Mr. Wynn was his own since there was no requirement that he do so.

In Greer v. Industrial Commission, 290 P. 900, it was established that an employee going home from his place of employment and not on any special mission for his employer was not in the course of his employment at the time of his accident. The Court stated that the fact the employee was carrying a saw belonging to the employer which was his duty to keep sharp was only incidental.

In the present case, the fact that Mr. Wynn happened to be in the tractor as opposed to his own personal transportation was also incidental and not

for the benefit of his employer.

The three cases cited by the applicant in her Motion for Review are all distinguishable from the present case. In Bailey v. Industrial Commission, 398 P. 2d 545 (1965), it was the decedent's regular and definite duty to take the vehicle to his work each morning. Mr. Wynn, on the other hand, had no definite duty to take the vehicle home.

In Mosher v. Industrial Commission, 440 P. 2d 23 (1968), Mosher was injured while carrying out specific instructions from his employer as to how he should start the truck. It was the carrying out of these instructions from his employer that subsequently caused his burns and disability. The decedent, Max L. Wynn, was under no instructions to drive the truck and specifically was under no instructions to drive around a railroad crossing guard in a negligent fashion which subsequently resulted in his death.

In Hafers, Inc. v. Industrial Commission, 526 P. 2d 1188, the employee was injured while working on an automobile assigned to him and whose definite duties included keeping the automobile in a safe and efficient condition. The plaintiff agrees that had Mr. Wynn been injured while working on the tractor, he would have been

in the course of his employment, but that is not the fact situation and is clearly distinguishable.

POINT II

MAX L. WYNN WAS NOT A STATUTORY EMPLOYEE OF CHARLES KINNE AND CHARLES KINNE THEREFORE HAS NO JOINT LIABILITY FOR WORKMANS COMPENSATION.

No appeal has been filed by Freeport Transport, Inc. or the State Insurance Fund contesting the finding that Max L. Wynn was the statutory employee of Freeport Transport, Inc. The Supplemental Order entered by the Industrial Commission on March 27, 1979 imposed joint and several liability on Charles Kinne. The pertinent language states:

> "We also find that the Lease Agreement made Mr. Charles Kinne the decedent's employer and although not exercised, he did have the right of control over the drivers enough, we conclude, to have made Mr. Wynn an employee of Mr. Kinne. We therefore conclude that the decedent was statutorily employed by Freeport Transport, Inc. and was also an employee of Mr. Kinne pursuant to the Lease Agreement which also required that Mr. Kinne carry workmans compensation coverage for his drivers."

It is submitted that the Commission has exceeded its powers by imposing compensation liability on Charles Kinne through interpretation of a contract between Charles Kinne and Freeport Transport, Inc. It has clearly been found and held that all of the pertinent aspects of control

were exclusively those of Freeport Transport, Inc.

Most of the cases cited in Charles Kinne's original Memorandum to the Commission involved similar lease arrangements as the one used by Kinne and Freeport. In each of the cases, the interstate carrier was considered the sole responsible employer for purposes of workmans compensation and no joint or several liability was imposed upon the middleman in the lease arrangement.

In Hartford Accident and Indemnity Company v. Major, 226 N.E. 2d 74 (Ill. 1967), the Court considered a similar issue involving the workmans compensation liability of Major to drivers of leased trucks under a similar lease arrangement.

Major claimed they were not employees because they could make deliveries by any route they chose; they could hire other persons to drive their trucks; they could trip lease to other carriers; they were required to pay for repairs, gasoline, oil, tires, equipment and licenses; they were paid by the job not on a time basis; they did not receive a payroll check; they paid the collision insurance on their vehicles; and Major did not withhold any income tax from the money which he paid to them.

The Court held they were employees on two bases. First was the common law basis to determine whether one is an employer or an independent contractor. The Court found the language of the lease was equivalent to a provision that Major had a right to fire the drivers; that Major in fact did threaten to withhold drivers' checks; Major did require the drivers to show how their time was spent while on trips; that the drivers could not trip lease without first calling the office; that they could not take a load from a certain dispatch point without first being dispatched by the office; that they were not to directly call shippers in one area; and that Major told them where to load and unload. The Court, applying the standard "Right to Control" test, determined that the drivers in question were employees of Major.

The Court went on to hold: "We find the trial Court was correct in its decision for another and more cogent reason -- that Major was a motor carrier of goods in interstate commerce operating under authority of a certificate of license issued by the Interstate Commerce Commission." The Court went on quoting from §304(e) of Title 49, United States Code Annotated, and from 49 C.F.R. 1057, both of which require that all leases provide for exclusive possession, control and use of

the equipment and for complete assumption of responsibility in respect thereto.

The Court quotes from the holding of the Supreme Court of North Carolina in Brown v. L. H. Bottoms Truck Lines, 117 N.C. 299, 42 S.E. 2d 71, wherein the Court said at page 75:

> "The transportation of goods in interstate commerce by motor vehicles was required to be under the rules and regulations of the Interstate Commerce Commission and the Brown truck could only have been used in such transportation by the defendant franchise carrier as one of its fleet of trucks under its license plates. Hence, it would seem to follow that control of the operation for the period of the lease was given to the licensed carrier, and that the owner driven truck was in contemplation of law in its employ and the driver for the trip stood in the relationship of its employee, as found by the Industrial Commission."
>
> "We think the applicable rule, under the facts here presented, is that the lease or contract by which the equipment of the authorized interstate carrier was augmented, must be interpreted as carrying the necessary implication that possession and control of the added vehicle was, for the trip, vested in the authorized operator."

In Proctor v. Colonial Refrigerated Transportation, Inc., 494 F. 2d 89 (Fourth Cir. 1974), the plaintiff sustained serious injuries in an accident while riding

as a passenger in a tractor-trailer being driven by E. O. Bales, the owner-lessor of said equipment, to the defendant Colonial. Colonial was a certified interstate motor carrier and the plaintiff was hired by Bales, the owner-lessor, as an assistant driver. The issue was stated by the Court as follows:

> "The primary issue upon this appeal is whether a motor carrier operating under a certificate from the Interstate Commerce Commission is liable to an employee of a lessor for injuries resulting from the negligence of the lessor in the operation of his equipment in the business of the lessee-carrier."

The Court's holding was as follows:

> "As a certified interestate carrier Colonial was subject to the supervision and control of the Interstate Commerce Commission, and in augmenting its equipment through the lease agreement with Bales, it was required to be in compliance with the Commission's regulations, 49 C.F.R. §1057.1-1057.6. These regulations and the statute under which they were promulgated require and provide that under such lease arrangements the lessee-carriers "will have full direction and control of such [leased] vehicles and will be fully responsible for the operation thereof . . . as if they were the owners of such vehicles . . ." These regulations were promulgated by the Commission to correct widespread abuses incident to the use of leased equipment by the

carriers, see American Trucking Association v. United States, 344 U.S. 298, 303, 73 S. Ct. 307, 97 L. Ed. 337 (1953), and the "intent [of the regulations] was to make sure that licensed carriers would be responsible in fact, as well as in law, for the maintenance of leased equipment and the supervision of borrowed drivers." Alford v. Major, 470 F. 2d 132, 135 (7 Cir. 1972). The statute and regulatory pattern clearly eliminates the independent contractor concept from such lease arrangements and casts upon Colonial full responsiblity for the negligence of Bales as driver of the leased equipment. Any language to the contrary in the lease agreement would be violative of the spirit and letter of the Federal regulations and therefore unenforceable . . ."

CONCLUSION

It is respctfully submitted that Max L. Wynn was outside the course of his employment at the time of his fatal accident and that the decision to return to Clearfield rather than proceed directly to California was not to the benefit of his employer and should not be imposed upon Charles Kinne. It is further submitted that Charles Kinne statutorily was not the employer of Max L. Wynn and therefore has no liability.

DATED this 18th day of June, 1979.

FLORENCE AND HUTCHISON

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MAILING CERTIFICATE

I hereby certify that I mailed copies of the foregoing Brief of Plaintiff, postage prepaid, to the following at the addresses listed below.

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MAILED this 19th day of June, 1979.

Eileen Christensen
EILEEN CHRISTENSEN, Secretary